Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Application by SBC Communications, Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in California	)	WC Docket No. 02-306

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SUMMARY

The Commission should promptly deny Pacific Bell's Application because, as found by the California Public Utilities Commission, Pacific Bell has not complied with all of the requirements of the Competitive Checklist in that Pacific Bell does not provide number portability or resale of advanced services in accordance with applicable requirements. While this, by itself, requires the Commission to deny the Application, the California Public Utilities Commission also found that, under applicable state standards, Pacific Bell does not qualify to provide interLATA service within California and that its entry into the long distance market would not serve the public interest. Further, as pointed out in the attached comments, the record before the California Public Utilities Commission contains ample evidence that Pacific Bell has engaged, and is engaging, in anti-competitive practices including joint marketing abuses. As demonstrated in the attached Declaration of Lee L. Selwyn, previously submitted to the California Public Utilities Commission, this and other circumstances show that, at the present time, the local market in California is not adequately open to competition.

As further explained in these comments, Pacific Bell's entry into the long distance market in California would harm interLATA competition. Pacific Bell, through its affiliated companies, is also engaging in an anti-competitive price squeeze by charging about Ten Dollars more per month for wholesale DSL service than it currently offers to retail customers for DSL-based Internet access service. In addition to number portability and resale of DSL, Pacific Bell also fails to satisfy the Competitive Checklist by failing to comply with requirements that reciprocal compensation be based on the tandem rate where the competitor's switch covers the equivalent of a tandem area. The Commission should also use this Application to assure that Pacific Bell provides interconnection to CLECs at TELRIC rates.

For all these reasons, apart from checklist compliance, the Commission may not find that grant of the Application would serve the public interest. The determination of the California Public Utilities Commission that grant of the Application would not serve the public interest goals of that state should be given determinative weight. Even if the Commission could lawfully mandate interLATA entry in spite of the decision of the state commission, it should not do so if the state commission, as in this instance, has determined that interLATA entry would not serve the public interest.

Accordingly, the Commission should deny the Application.

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PacWest Telecomm, Inc. ("PacWest"), RCN Telecom Services, Inc. ("RCN"), and U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific") (collectively, "the Commenters") submit these comments concerning the Application by SBC Communications, Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. ("Pacific" or "Pacific Bell") for Authorization To Provide In-region, InterLATA Services In California ("Application").[1] For the reasons stated in these comments, the Commission should deny the Application.

I. IF FOR NO OTHER REASON, THE APPLICATION MUST BE DENIED FOR FAILURE TO COMPLY WITH ALL CHECKLIST ITEMS

The Application presents to the Commission for the first time an application for Section 271 approval by a BOC in which the state commission found that the applicant fails to meet all of the requirements of the Competitive Checklist. Thus, on September 19, 2002, the

[1] Comments Requested on the Application by SBC Communications Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of California, Public Notice, WC Docket No. 02-306, DA 02-2333, released September 20, 2002.

California Public Utilities Commission ("CA PUC") released its decision regarding Pacific Bell's compliance with the Competitive Checklist and separately with the incumbent's compliance with Section 709.2 of California Public Utility Code governing incumbent intrastate interLATA market entry, following a six-year proceeding.[2] The *California Decision* concludes that Pacific Bell explicitly failed to meet Checklist Items 11, Number Portability, and 14, Resale.[3] Pacific Bell was further found to have failed to meet California's statutory obligations under State Code Section 709.2, a four-part test regarding Pacific Bell's ability to engage in anti-competitive behavior.[4] In short, the Commission has been asked for the first time to consider an Application for in-region interLATA market entry where an Applicant has not only been expressly found to be in non-compliance with some of the fourteen-point Competitive Checklist, but moreover, has been found by state regulators to have erected competitive entry barriers, particularly with respect to the resale of advanced services.

The California Commission's determination of present non-compliance with some Checklist items unequivocally demonstrates that Pacific Bell has not satisfied "the ultimate burden of proof that its Application satisfies all of the requirements of Section 271."[5] Therefore, Pacific Bell has not "take[n] the steps required to open its local markets to full competition," and

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[2] Decision Granting Pacific Bell Telephone Company's Renewed Motion for An Order That it Has Substantially Satisfied the Requirements of the 14-Point Checklist in §271 of the Telecommunications Act of 1996 and Denying That It Has Satisfied §709.2 of the Public Utilities Code, Public Utilities Commission of the State of California, Rulemakings (R.) 93-04-003 and R.95-04-043, and Investigations (I.) 93-04-002 and I.95-04-044 (released September 19, 2002) [the "California Decision"] at 3 (emphasis supplied).

[3] With respect to Digital Subscriber Line ("xDSL") services.

[4] California Decision at 239.

[5] Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York (Memorandum Opinion and Order), CC Docket No. 99-295, FCC 99-404, ¶ 44 (released December 22, 1999) ("Bell Atlantic New York Section 271 Order").

should not, and may not lawfully, now "be rewarded with Section 271 authority to enter the long distance market."[6]

In this connection, the Commission has recognized that "Section 271 . . . creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets"[7] and that "[i]ncumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act,* to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."[8]

Therefore, the Commission may not approve a regional Bell operating company application for in-region, interLATA authority unless and until the Commission finds, *inter alia*, that "the petitioning Bell operating company has . . . *fully* implemented the competitive checklist in subsection (c)(2)(B)."[9] As the Commission has correctly concluded, a regional Bell operating company's failure to satisfy even "an individual item of the competitive checklist constitutes *independent* grounds for denying . . . [an] application."[10] Moreover, Congress identified as an additional prerequisite for grant of a BOC application for in-region, interLATA authority a Commission determination that "the requested authorization is consistent with the public interest, convenience and necessity."[11] As the Commission has recognized, this latter criterion is "a

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6 Bell Atlantic New York Section 271 Order. ¶ 15.

7 Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543, ¶ 14 (1997).

8 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 55 (emphasis supplied).

9 47 U.S.C. 271(d)(3)(A)(i) (emphasis supplied).

10 Application of Bell South Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana (Memorandum Opinion and Order), 13 FCC Rcd. 20599, ¶ 50 (1998) (emphasis supplied).

11 47 U.S.C. 271(d)(3)(B), (C).

separate, independent requirement for entry," which necessitates a careful examination of "a number of factors, including the nature and extent of competition in the applicant's local market, in order to determine whether that market is and will remain open to competition."[12]

The conclusion of the California Commission, based on an extensive four-year contested case record, that Pacific Bell's failed to comply with of two separate Competitive Checklist Items is, by itself, sufficient cause for rejection of this Application. Accordingly, the Commission should promptly deny the Application on this basis.

II. THE APPLICATION MUST ALSO BE DENIED BECAUSE THE CALIFORNIA COMMISSION FOUND THAT PACIFIC'S BELL'S APPLICATION IS NOT IN THE PUBLIC INTEREST

In addition to the fact that Pacific Bell has not satisfied some of the Competitive Checklist, the Application presents the equally novel and remarkable situation that the state commission has found that Pacific Bell's Application is not in the public interest. The CA PUC noted:

> While Pacific largely satisfies the technical requirements of Section 271, in accordance with Section 709.2 we cannot state unequivocally that we find Pacific's imminent entry into the long distance market in California will primarily enhance the public interest. Local telephone competition in California exists in the technical and quantitative data; but it has yet to find its way into the residences of the majority of California's ratepayers.[13]

The CA PUC noted that "we foresee the harm to the public interest if actual competition in California maintains its current anemic pace, and Pacific gains intrastate long distance dominance to match its local influence."[14] Specifically, the CA PUC found that:

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[12] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 402.

[13] CA PUC 271 Order at 4.

[14] CA PUC 271 Order at 261.

> While we make the determination that all competitors have fair, nondiscriminatory, and mutually open access to exchanges, the record does not support our making the determinations that Pacific has manifested no anti-competitive behavior, has established no improper cross-subsidization, or poses no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets.[15]

As noted by Commissioner Lynch, "a 25% success rate for statutorily mandated criteria is not a passing grade."[16] In fact, the CA PUC imposed certain conditions on Pacific Bell designed to mitigate the harm to the public interest that its Application creates. The CA PUC required Pacific Bell: i) to submit a report on the feasibility of structurally separating the company into wholesale and resale entities; ii) to participate in an investigation to examine the efficacy, feasibility, structural implementation, and selection criteria for selection of a competitively neutral third-party PIC administrator for California; and iii) to subject itself to certain joint marketing restraints, to track and report its marketing of long distance service, and allow Staff to audit its long distance affiliate's marketing costs.[17] The CA PUC reiterated that Pacific's "less than complete progress has given California technical, not actual, local telephone competition."[18]

Pacific has intimated that it may challenge the imposition of these conditions. It notes in its Application that "to the extent the CPUC ultimately adopts any conditions that purport to block Pacific's entry into the intrastate interexchange market, those would be preempted, and we accordingly need not address them here."[19] Pacific Bell has repeatedly argued that Section 709.2(c) is preempted by the Telecommunications Act of 1996. As PacWest noted in the California proceeding,[20] this is wrong for several reasons, including the explicit language of

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15 CA PUC 271 Order at 3.

16 Separate Statement of Lorreta M. Lynch, dissenting at 2.

17 CA PUC 271 Order at 265.

18 CA PUC 271 Order at 265.

19 Pacific Bell at 95.

20 *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the*

Section 601(c)(1) of the Telecommunications Act of 1996,[21] Section 261(b) of the Communications Act,[22] and Section 253(b) of the Communications Act.[23] There is nothing inconsistent between Sec. 709.2(c) and the Communications Act.

Commenters respectfully submit that the conclusion of the CA PUC that the Application would not serve the public interest presents the strongest possible grounds for denying the Application. Commenters explain further below that the Commission should deny the Application under the separate public interest test of Section 271(d)(3)(C).

III. PACIFIC BELL HAS ENGAGED IN ANTI-COMPETITIVE CONDUCT

1. The CA PUC Has Found that PacBell Has Engaged in Anti-competitive Conduct

The Commission should also deny the Application for the simple reason that Pacific Bell has engaged, and is engaging, in anti-competitive conduct. Thus, in its Finding of Fact 321, the CA PUC found that "[t]he record does not support the finding that there is no anti-competitive behavior by Pacific Bell."[24] The CA PUC noted that Pacific Bell has been found to engage in anti-competitive behavior. Specifically the CA PUC noted two significant instances. The first

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Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service, CA PUC Docket Nos. R.93-04-003, I.93-04-002, R.95-05-43, I.95-04-044, Response of PAC-West Telecomm, Inc. and Working Assets Long Distance to Pacific Bell's Showing Regarding Public Utilities Code, Section 709.2 (Public Version) at 9 (August 23, 2001) ("PacWest Public Interest Comments"); *See also* Response Of Cox California Telcom, LLC (U-5684-C) To Pacific Bell Telephone Company's Answers, April 20, 2001.

[21] Section 601(c)(1) states: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments."

[22] Section 261(b) states: "Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part."

[23] Section 253(b) states: "State regulatory authority. Nothing in this Section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

[24] CA PUC Order at 3.

instance was a 1996 lawsuit filed by AT&T and Sprint against Pacific Bell and its affiliates which involved Pacific Bell's planned use of the long distance carriers' billing information in connection with one of its programs. As the CA PUC noted, the U.S. District Court for the Northern District of California found for the long distance carriers on the following grounds – i) breach of the billing agreements; ii) a violation of Section 222(a) of the Communications Act requiring telecommunications carriers to protect the confidentiality of proprietary information of other carriers; and iii) a misappropriation of trade secrets in the form of proprietary billing databases.[25]

Pacific Bell attempts to suggest that it was ultimately exonerated on these actions. The facts do not support this assertion. In regard to the Section 222(a) claim, the trial court denied the IXCs summary judgment on the issue and the IXCs ultimately abandoned the issue on appeal, but the Ninth Circuit held that "[a]lthough the district court properly denied summary judgment on the Carriers' direct § 222 claim for an injunction, and they have abandoned that claim on cross-appeal, the statute may provide a source of law providing support for finding a duty, an issue that the district court certainly may consider on remand."[26] The case, however, was ultimately settled, so the issue was never ultimately adjudicated.[27] The purported reversal on the trade secrets claim was simply a reversal on the trial court's finding that the IXCs were entitled to summary judgment on the issue. The Ninth Circuit simply found that there were issues of genuine material fact that should be adjudicated at trial.[28] Since the matter was ultimately settled, the issue was also never adjudicated. Thus, far from being exonerated, there were clear issues as to the propriety of Pacific Bell's actions. Pacific Bell's conduct was

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25 CA PUC 271 Order at 219, n. 391.

26 *AT&T Communications vs. Pacific Bell*, 238 F.3d 427 (9th Cir. 2000).

27 CA PUC 271 Order at 219.

28 *AT&T Communications vs. Pacific Bell*, 238 F.3d 427 (9th Cir. 2000).

certainly sufficiently anti-competitive to support a preliminary injunction.[29] Perhaps most telling is Pacific Bell's remark that "it is simply impossible to see what this case has to do with the public interest ramifications of Pacific's entry into long distance."[30] Anti-competitive conduct is highly relevant to considerations of the public interest. Moreover, misuse of proprietary data goes to the very heart of the joint marketing issue which will be discussed further in the next paragraph. If Pacific Bell was misusing information of other companies to leverage additional control in a monopoly market, the Commission should imagine what it might do when it seeks to make inroads in a competitive market.

The CA PUC also references a case involving CalTech International Telecom Corporation where Pacific Bell was found liable for unlawful monopolization of the local exchange telephone market in violation of 15 U.S.C. § 2.[31] The only thing Pacific Bell offers in retort to this instance of anti-competitive conduct is that the conduct occurred six years ago and that the case was ultimately settled.[32] As the CA PUC correctly found, however:

> Although eventually settled, the two federal court proceedings present findings of anti-competitive conduct. The case regarding AT&T, MCI and Sprint also involved the "unfair use of customer contacts generated... by the provision of local exchange telephone service." (Section 709.2(c)(2).) The CalTech International case found "unlawful monopolization," and was rendered less than two years ago.[33]

The most disturbing thing about these two cases is Pacific Bell seizing upon its monopoly power and improperly using customer contacts generated by the provision of its local service. These two factors leveraged together can give Pacific Bell a virtually insurmountable advantage when it enters the long distance market.

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29 *See* CA PUC 271 Order at 219.
30 Pacific Bell Application at 96.
31 *See* CA PUC 271 Order at 220.
32 Pacific Bell Application at 97.
33 CA PUC 271 Order at 220.

2. Pacific Bell Will Utilize A Combination of Joint Marketing and Cross-Subsidization to Impede Competition

In the CA proceeding, PacWest demonstrated the huge advantage that Pacific Bell possesses in joint marketing even before any specter of anti-competitive conduct is introduced into the equation. PacWest stated:

> the joint marketing advantage conferred by Pacific's local monopoly position is monumental in scope. Pacific receives several million incoming customer service calls per year from its existing local service customers. Pacific fully intends to make each one of these into a marketing opportunity for SBC-LD using Pacific customer service representatives. No other interLATA competitor in California has any similar massive opportunity (monopoly-based or otherwise) to address incoming calls from potential interLATA customers. As Dr. Selwyn explains, the ability to address *incoming calls* from customers with local service issues, and the customer's perception that these issues now will be addressed only if the customer cooperates with an SBC-LD sales pitch, is far different than making millions of *outgoing cold calls*.[34]

The CA PUC concurred finding that Pacific Bell's past record:

> "contains . . . findings of anticompetitive conduct" and, therefore, provided the CA PUC with sufficient justification to impose specific joint marketing restrictions on Pacific Bell in order to prevent harm and discrimination by Pacific Bell against its competitors.[35] The CA PUC stated:However, we differ from the FCC's view that permitting the incumbent to joint market its long distance affiliate's services to incoming callers is a harmless and nondiscriminating advantage. Specifically, we are mindful that unrestricted use of customer contacts could be unfair and jeopardize customer service. However, there are ways of addressing this issue through marketing rules and equal access disclosure.[36]

Therefore, as a condition of granting Pacific Bell's 271 Application, the CA PUC, through the application of Pacific Bell's Tariff Rule 12, imposed the following restrictions on Pacific Bell's joint marketing of long distance services: (1) for incoming calls, "Pacific is prohibited from marketing its optional or affiliate services unless specifically requested by the customer"; (2) "Pacific must inform customers of their right to select an interLATA carrier of

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34 Selwyn Affidavit, ¶¶ 54-55.
35 CA PUC 271 Order at 256.
36 CA PUC 271 Order at 218-219.

their choice prior to stating that they offer long-distance services;" (3) "Pacific must respect the selection of a customer should the customer select another long-distance provider;" and (4) "Pacific must clearly receive a customer's agreement for long-distance service (PIC) and local toll (LPIC) before changing a PIC and LPIC."[37]

Given the CA PUC's findings with respect to the serious anti-competitive impact of joint marketing abuses by Pacific Bell and, hence, its adoption of specific practices to mitigate this harm, it is critically important that the Commission support this effort by the CA PUC. The Commenters maintain that Pacific Bell's anticompetitive conduct, as described by the CA PUC, provides further evidence why the Commission should deny Pacific Bell's Application as not being in the public interest.[38]

In addition, Pacific's long distance affiliate will be receiving this marketing advantage at prices far below cost. As PacWest observed:

> the amount of compensation which Pacific will receive from SBC-LD on sales to consumers -- approximately $3.54 and nothing for sales attempts -- is ludicrously low when compared to the market value of such services, which is the legal criteria the Commission has established when such services are provided by a utility to an affiliate. For example, the commonly known range of industry customer acquisition costs of $300 to $500 per customer. The compensation to be paid Pacific is similarly absurd when compared to the costs Pacific will incur to provide the marketing and sales services involved,[39] as demonstrated by Dr. Selwyn.[40] These below-cost and below- market value services constitute a direct subsidy to SBC-LD by Pacific which will harm the interLATA market by

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37 CA PUC 271 Order at 257-60.

38 However, should the Commission grant Pacific Bell's Application, it should, at a minimum, impose the CA PUC's joint marketing restrictions, as described above, on Pacific Bell.

39 PacWest Public Interest Comments at 22. The Pacific agreement establishing this compensation is based on a calculated hourly cost applied to projected customer service transaction times.

40 *See* Selwyn Affidavit, ¶ 86 & n.102. For example, Pacific's compensation is based on a calculated hourly cost applied to projected SBC-LD joint marketing transaction times. Yet Dr. Selwyn actually timed several of the scripts provided by Pacific and found that they could not be completed in anything like the time assumption apparently used by SBC-LD to determine Pacific's compensation. *Id.*, ¶ 88.

> providing SBC-LD a market advantage flowing directly from Pacific's monopoly local service position, and will also harm Pacific's local service ratepayers.[41]

The CA PUC concurred that this cost analysis regarding Pacific Bell's proposed joint marketing plan "demonstrates cross-subsidization, may exist, and we find it very troubling."[42] The CA PUC stated that since its "confidence in non-structural safeguards has waned significantly over the years, we will request Commission staff to audit Pacific's joint marketing arrangements with PBLD . . . ."[43] Once again, Pacific Bell's willingness to comply with these requirements is in question as it has unilaterally deemed that "there is no reasonable basis for concluding that there remains a risk of cross-subsidization."[44]

The fact that the history of the marketing practices of Pacific is a checkered one at best does little to add confidence that Pacific Bell will not use its monopoly control and access to customer information to a discriminatory advantage. On April 6, 1998, UCAN filed a complaint alleging that Pacific Bell was: i) persuading customers to switch from complete Caller ID blocking to selective blocking by providing incomplete and misleading information about the service and the level of privacy protection it provided; ii) marketing packages of services under the name "The Basics" and the "Basics Plus" which suggest that the services are basic telephone service rather than a package of optional features; iii) offering the most expensive inside wire repair service first and only telling customers of a lower-priced option if they reject the first; iv) unlawfully using and disclosing customer proprietary network information, and iv) employing

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41 PacWest Public Interest Comments at 22.
42 CA PUC 271 Order at 256.
43 CA PUC 271 Order at 256.
44 Pacific Bell Application at 98.

sales programs and practices which operated to the detriment of customer service and quality customer information.[45]

The CA PUC found that Pacific Bell failed to sufficiently inform customers regarding the number blocking options to prevent a caller's number from being displayed on a Caller ID device. It also found that Pacific Bell's marketing policy of sequentially offering packages of services in descending order of price fails to sufficiently inform customers because they are not told of the lesser priced package unless they refuse the more expensive option. The CA PUC also held that Pacific Bell could not use the Universal Lifeline Telephone Service subsidy program as a link to market other optional services, and that "The Basics," a package of optional services, inaccurately suggests a relationship with basic telephone service. To remedy these violations, the CA PUC ordered Pacific Bell to (1) notify customers who were affected by its violations and make any necessary corrections, (2) pay a $25.55 Million fine, and (3) revise Tariff Rule 12 to ensure that customer service requests are fulfilled prior to subjecting customers to marketing pitches.[46]

The findings of the CA PUC concerning Pacific Bell's unlawful joint marketing effort converts the issue from the hypothetical risk the FCC may have considered in the past to a demonstrated propensity by Pacific Bell to use joint marketing in an anti-competitive manner.Pacific Bell's history does little to elicit confidence that it will conduct its joint marketing in a way that will not harm the public interest.

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[45] *The Utility Consumers' Action Network v. Pacific Bell*, Case 98-04-004, Opinion Granting Compensation Award, D.02-03-038 (March 21, 2002).

[46] *Id.*

IV. GRANT OF THE APPLICATION WOULD HARM INTERLATA COMPETITION

Because it would be premature, granting the Application now would harm interLATA competition. The Commission should be vigilant to ensure against the danger of a premature grant of Section 271 authority. If an RBOC is allowed into the long distance arena before a local market is irreversibly open, local competition will not develop, and long distance competition could be imperiled.[47] As Dr. Cooper of the Consumer Federation of America noted:

> [t]he risk that arises from a rush to approve the 271 is that the incumbent can exploit the anti-competitive conditions, or 'competitive imbalance,' in the critical early days of the bundled telecommunications market. It can then rapidly capture long distance customers by bundling local and long distance service, while competitors are unable to respond with a competitively priced bundle. Allowing premature entry will cause the CLEC industry to shrink, as RBOCs capture long distance market share. The incentive to open the local market will be eliminated.[48]

As the Commission has also noted:

> Section 271, however embodies a congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.[49]

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[47] *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Services, Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service,* California Public Utilities Commissions Docket Nos. R.93-04-003, I.93-04-002, R.95-04-043, I.95-04044, Comments of Dr. Mark N. Cooper for the Consumer Federation of America on Public Interest Issues at 16 (Aug. 23, 2001) ("*CFA CA Comments*").

[48] *Id.*

[49] *Ameritech Michigan 271 Order* at ¶ 388.

While a BOC's entry into the long distance market may have pro-competitive effects, those benefits are only sustainable if the local telecommunications market remains open after BOC entry.[50] The present and future state of competition is not promising in the Pacific Bell region.

Pacific Bell's past public filings with the FCC state that, at the end of 1997, Pacific had 17.1 million access lines in service,[51] all of which were served using loops that Pacific owns and controls. That figure increased, by 700,000 lines, to 17.8 million lines at the end of 1998.[52] According to Pacific Bell, it currently holds about 80% of the ILEC local lines in California,[53] and serves about 17.5 million lines as of April of 2001.[54] The most recent FCC survey results for California indicates that CLECs serve about 1.667 million lines.[55] About 20% of those lines would be in Verizon service territory, leaving approximately 1.33 million CLEC lines in Pacific Bell's service territory. Given those results, CLECs serve about 7.6% of the Pacific Bell market. In the FCC's latest *Local Competition Report*, the CLEC market share in California was lower than the CLEC market share in Colorado, the District of Columbia, Georgia, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, and Virginia.[56] The CLEC market share in California was less than a third of the market share in New York (23%) and half of the market share in Texas (14%), two states to which Pacific likes to compare California favorably.[57] In

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50 *Id.* at ¶ 390.

51 *See Responses to CCB Survey on the State of Local Competition*, commissioned by the Federal Communications Commission for 1997 and 1998 (hereinafter "FCC Local Competition Survey"). As the FCC explained on the cover page to the initial survey, on February 20, 1998, large telephone companies were asked to complete "a short survey on the state of local competition at the end of 1997 for each state in which the company or affiliate .... serves as an incumbent local exchange carrier." An electronic version of all the surveys is available on the FCC's web site at <http://www.fcc.gov/ccb/local_competition/survey/responses/>.

52 Included in the 17.8M line figure are residential and business lines; local payphones lines are excluded.

53 Sumpter Affidavit at ¶ 26, *citing,* Tebeau Affidavit, Table 4.

54 Pacific Bell Application, Affidavit of J. Gary Smith at ¶ 8, n. 8.

55 FCC Local Competition Report, February 27, 2002, Table 6.

56 FCC Local Competition Report, February 27, 2002, Table 6.

57 FCC Local Competition Report, February 27, 2002, Table 6.

fact, the CLEC market share in California was lower than the nationwide average of 9%. Thus, the most populous state in the nation is a state that has seen competition which the CA PUC itself terms "anemic."

There is a strong contrast between the long distance market and the local market in California. As PacWest noted:

> In the long distance market, it took competitors 5 years to capture 25% of the market. In the local market, after 5 years competitors serve less than 7% of that market. In the long distance market, after 5 years, competitors controlled over half the long distance facility capacity in the state. After 10 years, long distance competitors controlled about 80% of the facility capacity. In the local market, there is no evidence that vendors have installed competitive local loop facilities to serve more than a few percent of the market.[58]

There is a significant danger that Pacific Bell will use its local monopoly to leverage control in the long distance market and ultimately dampen competition in both markets. The danger of a premature grant of Section 271 authority in California would be to diminish further the prospects of local competition and allow Pacific Bell to leverage its local monopoly market power in the long distance area. AT&T provides a very cautionary tale. Texas is an illuminating example. AT&T notes how the Public Utility Commission of Texas filed a report earlier this year on the state of local competition in Texas. As AT&T chronicles:

> The *TPUC Report* makes clear that even today, a year after obtaining 271 authorization in Texas, SWBT retains monopoly control of the residential local market in Texas and has raised prices for local service. CLEC competition for residential customers, while initially active, has faded, as experience has demonstrated that entry into local residential markets is not profitable. This lack of competition in Texas has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services, and having established its market power, to raise its price for long distance service.[59]

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[58] Sumpter Affidavit at ¶ 45.

[59] CC Docket No. 01-194, Comments of AT&T Corp. at 88-89 (September 10, 2001).

The unprecedented market share gains for RBOCs when they enter long distance markets is by now well documented. In fact, Pacific trumpets the statistics in its Application. After only six months in Texas, SBC had 1.7 million long-distance lines; after only nine months, that number had grown to 2.1 million lines. Twelve months after entry in Texas and four months after entry in Oklahoma and Kansas, SBC had a total of 2.8 million long-distance lines in service.[60] These statistics are blindly proffered as purportedly demonstrating that such market entry is good in and of itself. The Texas experience suggests that one must look beyond the numbers and see what is transpiring in the market. As AT&T noted, "the lack of competition in Texas has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services, and having established its market power, to raise its price for long distance service."[61] California is at greater risk for such an occurrence because not only is there less competition in California, but also because of Pacific Bell's history of anti-competitive practices and questionable marketing practices. As summarized by Dr. Lee Selwyn:

> Finally, I examine the impact upon competition in the California interLATA long distance market were SBC-Pacific is permitted to offer this service while still maintaining its current level of overwhelming dominance in the local service market, and show that unless a serious and substantial change in the competitive local services landscape were to emerge quickly and irreversibly, SBC-Pacific will soon come to dominate and ultimately monopolize the adjacent, currently highly competitive, long distance market as well.[62]

There is a further risk of harm to the long distance market. When an RBOC enters a long-distance market there is an inherent conflict of interest in regard to its role as administrator

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60 Pacific Bell Application at 84.

61 CC Docket No. 01-194, Comments of AT&T Corp. at 88-89 (September 10, 2001).

62 *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange*

of primary interexchange carrier changes. The RBOC can easily use the PIC change process as an avenue for both customer retention and procurement. A couple of years ago, Pacific unilaterally stopped allowing IXCs to process PIC changes through the system (CESAR) that processed IXC PIC change orders when Pacific turned off the system for several weeks and only reversed itself when carriers complained to the Commission. Unless the PIC administration function is put in the hands of a neutral third party, Pacific could easily create new ways to obstruct or even halt PIC change requests by its competitors.[63] The Commission should endorse the requirement of the CA PUC that Pacific Bell implement this approach to PIC change requests.

The CA PUC noted that it conducted an audit of Pacific Bell's PIC administration that indicated "there were problems with a significant percentage of Pacific's reporting of intraLATA PIC disputes after we approved intraLATA competition."[64] As a result, the CA PUC found:

> There is a reasonable question as to the appropriateness of relying on Pacific to determine a PIC/LPIC dispute, and to assess a slamming switching fee onto competing interexchange carriers. Further, it is reasonable to question the appropriateness of the Commission's enforcement staff continued reliance on Pacific's PIC dispute reports. We find that absent competitively neutral and nondiscriminatory PIC dispute reporting and administration there is a possibility that the interstate interexchange market will be harmed through increasing carrier conflicts.[65]

Based on this, the CA PUC plans to initiate an investigation to examine the "efficacy, feasibility, structural implementation, and selection criteria for selecting a competitively neutral third-party administrator."[66] Once again, Pacific Bell asserts that "there is nothing in the record to call into

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Service, CA PUC Docket Nos. R.93-04-003, I.93-04-002, R.95-05-43, I.95-04-044, Declaration of Lee L. Selwyn on behalf of Pac-West Telecomm., Inc. and Working Assets Long Distance at ¶ 2 ("Selwyn Affidavit").

63 Sumpter Affidavit at ¶ 70.

64 CA PUC 271 Order at 260.

65 CA PUC 271 Order at 260.

66 CA PUC 271 Order at 263.

question Pacific's actual performance as the PIC administrator," suggesting a strong objection on the part of Pacific Bell to implementing this proposal. As the CA PUC observed, "Pacific's dismissive rejection of the interested parties' proposals lacked not only supporting data but also any willingness to address the parties' concerns or perceptions."[67] If Pacific fails to embrace unequivocally the conditions set by the CA PUC, there is no hope of mitigating the harm to the public interest, and its Application should be summarily denied.

V. THE CALIFORNIA PUC DECISION SHOULD BE ACCORDED SIGNIFICANT WEIGHT

The California PUC has conducted what is without a doubt the most extensive and comprehensive public interest analysis that a state commission has done in the context of a Section 271 application. The public interest consideration is rooted in a state statutory provision that predates the 1996 Act. In 1994, the California State Legislature enacted Section 709.2 of the Public Utilities Code. The legislation envisioned that one day Pacific would enter into the long distance market , but only after ensuring that there is no substantial probability of harm to the long distance market.[68] To make this determination, the CA PUC would have to develop a factual record and make an assessment of Pacific Bell's market power in the local service market.[69]

Specifically the CA PUC is required to make four determinations prior to authorizing Pacific Bell's entry into the long distance market. These determinations include: 1) that

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[67] CA PUC 271 Order at 263.

[68] *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service,* CA PUC Docket Nos. R.93-04-003, I.93-04-002, R.95-05-43, I.95-04-044, Affidavit of John F. Sumpter on Behalf of Pac-West Telecomm, Inc. at ¶¶ 7-9 (August 23, 2001) ("Sumpter Affidavit").

[69] *Id.*

competitors have fair, nondiscriminatory access to exchanges; 2) that there is no anti-competitive behavior by the local exchange telephone corporation, including unfair use of subscriber contacts generated by the provision of local exchange telephone service; 3) that there is no improper cross-subsidization of interexchange telecommunications service; and 4) that there is "no substantial possibility of harm" to the competitive intrastate interexchange telecommunications markets.[70]

It is clear that many of the same determinations that frame the CA PUC's determination under Section 709.2 are applicable and highly relevant to this Commission's determination under the Section 271 public interest standard. For example, determination number 1 pertains to whether Pacific Bell has opened its local markets to competition. Determination number 2 relates to whether there are any anti-competitive activities that will create barriers to opening markets and imperil competition once markets are opened. Determination number 3 lies at the heart of why RBOCs are precluded from providing long distance service until the requirements of Section 271 are satisfied. Finally, determination number 4 examines the effect of Pacific Bell's entry into the long distance market, a consideration to which Pacific Bell itself devotes a considerable portion of its Application.[71] Ultimately both Section 709.2 and Section 271's public interest standard both hinge on the existence or absence of market power in the hands of Pacific Bell.[72]

Perhaps even more important than the overlap in determinations that Section 709.2 and Section 271(d)(3) require is the substantial record the CA PUC has developed on the issue of what is in the public interest in California. The CA PUC conducted a separate phase of its

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70 Cal. Pub. Util. Code §§ 709.2(c)(1)-(4).

71 *See* Pacific Bell Application at 83-87.

72 Sumpter Affidavit at 12.

Section 271 proceeding devoted exclusively to the public interest issue. The proceeding involved a submission by Pacific Bell including affidavits, exhibits, and other documents. Interested parties were then given an opportunity to respond, and Pacific Bell had a chance to reply. Oral arguments were made and considered.[73]

Pacific Bell would have this Commission disregard not only the determinations made by the CA PUC on the issue of the public interest, but also the extensive record elicited in the proceeding. Pacific Bell states that this Commission "has no obligation even to consult the state commission regarding the public interest, much less to give its determination any weight."[74] There is, however, nothing that precludes a state commission from conducting such an inquiry, and, in fact, state commissions, as part of their consultation reports, have often commented on the public interest standard.[75] The Commission considers the state commission's report on public interest issues and will factor it into its analysis.[76] The Commission will need a record to make the public interest determination and the CA PUC has provided the most extensive record a state commission has developed on the public interest issue.[77] As the Commission has noted,

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[73] *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service,* CA PUC Docket Nos. R.93-04-003, I.93-04-002, R.95-05-43, I.95-04-044, Decision Granting Pacific Bell Telephone Company's Renewed Motion for an Order That It Has Substantially Satisfied the Requirements of the 14-Point Checklist in § 271 of the Telecommunications Act of 1996 and Denying That It Has Satisfied § 709.2 of the Public Utilities Code, Decision 02-09-050 at 213 (September 19, 2002) ("CA PUC 271 Order").

[74] Pacific Bell Application at 95.

[75] *See, e.g., Application by Verizon New England, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Rhode Island*, CC Docket No. 01-324, Rhode Island Public Utilities Commission's Evaluation of Verizon Rhode Island's Compliance with Section 271 of the Telecommunications Act of 1996 at 188-192 (Dec. 14, 2001); *Application by SBC Communications, Inc.. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in Arkansas and Missouri*, CC Docket No. 01-194, Written Consultation of the Missouri Public Service Commission at 27-28 (Sept. 10, 2001).

[76] *Arkansas/Missouri 271 Order*, at ¶ 126 and n. 401.

[77] *See* Sumpter Affidavit at ¶¶ 9, 12.

"[w]e believe that the state commissions' knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs' local markets to competition."[78] The Commission should attach substantial weight to the evidence elicited in the CA PUC proceeding, and the determinations made based on the evidence, in determining whether Pacific Bell's Application is in the public interest.

VI. PACIFIC FAILS TO PROVIDE ADEQUATE NUMBER PORTABILITY IN VIOLATION OF CHECKLIST ITEM 11

Section 271(c)(2)(B)(xi) of the 1996 Act requires an RBOC to comply with the number portability regulations adopted by the Commission pursuant to Section 251. Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[79] The 1996 Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[80]

AT&T noted in the CA PUC 271 proceeding that deficiencies in Pacific Bell's systems have led to unexpected loss of dial tone for a number of its end users.[81] Loss of dial tone will frustrate the customer who will blame the CLEC regardless of the fact that Pacific Bell is at fault. AT&T noted that Pacific Bell had intransigently refused to implement a mechanized Number Portability Administration Center check that at least one other RBOC had in place for over three

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78 *Ameritech Michigan 271 Order* ¶ 30.

79 *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 at ¶ 369 (June 30, 2000) ("*SBC TX 271Order*").

80 *Id.*

81 CA PUC 271 Order at 173.

years. Implementation of the check would mitigate, if not eliminate, the loss of dial tone problem.[82] Pacific conceded that implementing the check would address the problem, but said it would take 12 to 18 months to implement the check after it completed cost studies on implementing the process. The cost studies still have not been completed. AT&T noted that the system changes required are simple and could be completed in three to six months.[83] Cox noted that its customers also experienced loss of dial tone when the customer had to reschedule at the last minute.[84]

> The CA PUC found that:
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> Mechanization of the NPAC check is crucial. This enhancement will mechanically delay a Pacific disconnect if the activation of the NPAC porting request has not been completed by the due date. We find that Pacific's justification for the September 2002 scheduled completion, given that a NPAC feed to its system already exists, does not explain why implementation of a mechanized enhancement to the NPAC check should take almost a year. At present, the CLECs do not have certain knowledge of when Pacific will disconnect certain customers, and cannot maintain the integrity of these end-users' dial tones. The continuing delay of this process presents a critical barrier to entry for the CLECs.[85]

Due to Pacific Bell's failure to implement the process, the Commission determined that:

> we cannot find and/or verify that Pacific has satisfied the compliance requirements for Checklist Item 11 until it implements and verifies this essential element of local number portability in California. To verify implementation, Pacific shall provide this Commission with confirmation including 30 days operational data.[86]

What is particularly troubling about this situation is that Pacific Bell had the ability to implement this process but failed to do so for so many years. Then when it finally conceded that it could implement the process it proferred inflated implementation times. The CA PUC was correct to

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82 CA PUC 271 Order at 174.
83 CA PUC 271 Order at 174.
84 CA PUC 271 Order at 175.
85 CA PUC 271 Order at 178.
86 CA PUC 271 Order at 178.

find this a critical barrier to entry, and Pacific Bell's failings in this area alone are sufficient to mandate a denial of the Application. These performance deficiencies are particularly troubling because as the Commission has noted number portability is essential to meaningful competition and provides consumers flexibility in the way they use their telecommunications services.[87] Pacific Bell's actions, once again, demonstrate that it is not acting in the best interest of California customers. Pacific Bell would allow customers to lose dial tone merely because they were no longer its customers.

VII. PACIFIC BELL'S RESTRICTIONS ON THE RESALE OF ADVANCED SERVICES DO NOT COMPLY WITH CHECKLIST ITEM 14

In its evaluation of SBC's initial Missouri application, the Department of Justice noted that there are "serious concerns pertaining to SBC's resale of advanced services, namely whether SBC is offering DSL services to end users without making those services available for resale at a wholesale discount."[88] The Department of Justice noted that if true, this refusal would raise issues in regard to SBC's compliance with Section 251(c)(4) of the Act and *Association of Communications Enterprises v. FCC.*[89] Pacific admits that it is following the same practice in California as it did in Missouri, *i.e.,* that since it purportedly does not offer a DSL telecommunications service at retail, it is not required to offer such a service at a resale discount pursuant to Section 251(c)(4).

AT&T noted, however, that until May 2001, Pacific was marketing a retail DSL service not only to ISPs, but to end user customers.[90] Pacific marketed the product on its website. The

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87 *In the Matter of Telephone Number Portability*, CC Docket No. 95-116, First Report and Further Notice of Proposed Rulemaking, FCC 96-286, 11 FCC Rcd. 8352, ¶ 28 (1996).

88 CC Docket No. 01-88, *Department of Justice Missouri Evaluation* at 20 (May 9, 2001).

89 *Id., citing,* 235 F.3d 662 (D.C. Cir. 2001) (An ILEC may not avoid obligations pursuant to Section 251(c) with respect to advanced services by providing them through a subsidiary).

90 CA PUC 271 Order at 188.

end user could purchase this product directly from Pacific. The end user could purchase either a combined DSL transport/internet access product or as a stand-alone DSL service where the end user could pick its own ISP.[91] Pacific used to bill directly some end users for this DSL transport service.[92] Pacific claims now the product is offered exclusively to ISPs, so now it is a "wholesale" product.[93]

The second product is a high-speed DSL internet access service that end users can purchase from Pacific Bell's affiliate, Pacific Bell Internet Services ("PBIS"). Pacific Bell admits that this product is a retail product but claims that since this product combines an information service (internet access) with a telecommunications service (DSL transport) it is a "retail information service" that does not need to be resold.[94] With both these products it appears that Pacific is playing word and shell games to avoid its resale obligations.

This Commission has unequivocally stated that an applicant is required to show that its affiliates provide DSL and advanced services in accordance with the decision in *ASCENT*.[95] It is undisputed that an affiliate of Pacific is providing DSL service on a retail basis to end users. Pacific's machinations are similar to those used by Verizon in Connecticut to avoid its Section 251(c) resale obligations. Verizon claimed it was not required to resell DSL service where other carriers are providing voice service over the line. As the Commission made clear, "the *ASCENT* decision made clear that Verizon's resale obligations extend to VADI regardless of whether it continues to exist as a separate entity or whether it is integrated into Verizon, and

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91 CA PUC 271 Order at 188.
92 CA PUC 271 Order at 188.
93 CA PUC 271 Order at 191.
94 CA PUC 271 Order at 191.
95 *Application of Verizon New York, Inc., et al., for Authorization to Provide In-region, InterLATA Services in Connecticut*, CC Docket No. 01-100, Memorandum Opinion and Order, FCC 01-208, ¶ 27 (July 20, 2001) ("*Verizon Connecticut 271 Order*").

regardless of the way Verizon structures VADI's access to the high frequency portion of the loop."[96] Likewise here, the Commission should make clear that regardless of the way Pacific defines its DSL product or structures the delivery of the product to the end user it cannot evade the requirements of Section 251(c)(4) and *ASCENT.*

As the Commission noted, policies that prevent competitive resellers from providing both voice and DSL service to their customers while the incumbent can provide such a combined product is clearly contrary to the "pro-competitive Congressional intent underlying Section 251(c)(4)" because it "severely hinders the ability of other carriers to compete."[97] Pacific's evasive actions also severely undercut the public interest by stunting the development of competition in the advanced services market. Pacific controls 97% of the DSL market in California and the competitive DSL market share is shrinking.[98] Clearly its joint marketing efforts with PBIS are proving to be very effective, and once it can offer long distance service into its bundled offering, the disparity in the advanced services market is likely to grow. Allowing Pacific to restrict opportunities to resell its DSL service is not in the public interest.

The CA PUC found that not only do Pacific's evasive actions violate its resale obligations, but they are also not in the public interest. The CA PUC found that:

> The record, which includes Pacific's statements and the marketing information from its web site, demonstrates that PBIS' services are designed for, and sold to residential and business end-users. The DSL Transport Services provided to PBIS by ASI, are telecommunications services that enable PBIS to offer its services to end-users. Without the DSL Transport Services provided to PBIS by ASI, PBIS could not reach its end-users. Under *ASCENT*, an ILEC cannot set up a wholly owned affiliate that offers advanced services in order to avoid its resale obligations under § 251(c)(4). Notwithstanding the *Second Report*'s definition of "at retail," current law does not allow an ILEC to achieve with two affiliates what it cannot achieve with one. PBIS is not simply an ISP that combines DSL service

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96 *Id.* at ¶ 32.

97 *Id.*

98 CA PUC 271 Order at 190.

> with its own Internet service. Pacific affiliate PBIS receives DSL services from Pacific affiliate ASI, and those advanced telecommunications services become PBIS' retail services. Indeed, it is the affiliation between the three -- Pacific, ASI and PBIS -- that effectively creates Pacific's provision of DSL Transport Services at retail. The *Second Report* and 47 C.F.R. § 51.605(c) do not alter this fact.[99]

The CA PUC went on to note:

> California is the nation's most populous state. Representing the world's sixth largest economy, with a gross state product of $1.21 trillion, there is significant potential for the growth of advanced services here. Pacific's DSL market dominance in California is increasing while its competitors' DSL market share is shrinking. As ORA notes, the majority of California ratepayers have no provider choice other than Pacific for DSL access service. In the absence of a discounted DSL market, competition in California will fester in the midst of the Pacific, ASI, and PBIS integration. Thus, we find that Pacific has erected unreasonable barriers to entry in California's DSL market both by not complying with its resale obligation with respect to its advanced services pursuant to § 251(c)(4)(A) and by offering restrictive conditions in the ASI-CLEC agreements in contravention of §251(c)(4)(B). To be in full compliance with the requirements of Checklist Item 14, Pacific must remove the barriers to entry of the California DSL market and meet its resale obligation of advanced services. Accordingly, we find that Pacific has not satisfied the requirements of Checklist Item 14, and we decline to verify compliance thereof.[100]

The Commenters understand that the Commission is addressing this issue in a separate proceeding, but the rules as currently applied, the language of *ASCENT*, and the public interest all counsel for a finding that Pacific has not met its Section 271 Checklist Item 14 obligations in this regard. At the very least, the steps Pacific Bell took to evade its resale obligations further demonstrate that it does not act in the public interest.

VIII. SBC'S INFLATED WHOLESALE PRICING UNLAWFULLY IMPOSES A PRICE SQUEEZE ON COMPETITORS IN THE DSL MARKET

Section 251 of the Act and the *Computer Inquiry* rules are both designed in part to assure a competitive market for broadband telecommunications and information services. Under the

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99 CA PUC 271 Order at 194-195.

100 CA PUC 271 Order at 195.

Computer Inquiry rules, SBC is required to make available its DSL transport services to non-affiliated ISPs on the same rates, terms, and conditions that it affords to its own ISP operations. Meanwhile, Section 251 requires SBC to provide network elements and collocation to CLECs so that they can provide competing wholesale DSL service to ISPs. By setting its wholesale DSL service rates too high, however, SBC has been able to monopolize the wholesale and retail DSL markets by imposing a price squeeze that forecloses viable competition. As a result, SBC's ISPs control more than 80% of the retail market,[101] and approximately 90% of the wholesale market once major CLEC competitors such as NorthPoint and Rhythms were forced out of business by the ILECs' price squeezes.

Although the SBC ISPs nominally obtain service at the same rates offered to other ISPs, these intra-company transactions have no real-world significance because the ISP affiliate can readily agree to lose money as long as the service it provides is making money for the overall company. Thus, SBC can set its UNE and wholesale rates too high, but keep its retail rates cost-based and, thereby, make the gap between these rates too small to permit viable competition from any company that must rely on the wholesale rates.

ASI, SBC;s advanced services affiliate, provides wholesale ADSL access services and transport for more than $40 per end user DSL customer. For example, the loop portion of a 1.5 megabits per second ADSL service is $35 to $39 per line, depending on the volume and term plan selected.[102] On top of this cost, the ISP must purchase ATM services from SBC in order to transmit DSL traffic to and from the central office. These services are not priced per customer,

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[101] SBC Investor Briefing, "Strong Growth in Data, Wireless and Long-Distance Highlights SBC's First-Quarter Results (April 23, 2001), at 4) (indicating that "more than 80% of [SBC's DSL] customer base obtains Internet access service directly from an SBC or affiliate"), http://www.sbc.com/Investor/Financial/Earning_Info/docs/1Q_IB_FINAL.pdf (viewed October 8, 2002).

[102] See ASI FCC Tariff No. 1 at § 6.6.

but represent a substantial additional cost to an ISP's per customer costs, as they add several thousand dollars a month to the ISP's bill from SBC for each service area where they do business.[103] In addition to the $40+ paid to SBC, the ISP must incur significant costs for Internet access and transport, content and application services, servers, web hosting, customer service, and other ISP service features.[104]

It is clear that ASI is vastly overcharging ISPs for these wholesale services. SBC's own ISPs offer retail ISP services for as low as $29.95 per month for six months.[105] Even if a customer ultimately pays more than this amount per month after the promotional period expires, even on an annualized basis, the SBC retail rate is lower than its wholesale rates.[106] Clearly, it is impossible for an independent ISP using ASI's tariffed wholesale rates to compete with the new SBC-ISP pricing.

The Commission is required by Section 271, and more specifically, *Sprint v. FCC*, to consider the public interest ramifications of a price squeeze before granting interLATA authority to SBC, notwithstanding any finding of *nominal* compliance with the checklist.[107] The D.C. Circuit held that evidence of a price squeeze may require that an ILECs' rates be set at a lower range within "the zone of reasonableness" than the maximum rate that is otherwise able to pass muster for Section 271 analysis.[108] The court explicitly makes a profitability analysis

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103 See ASI FCC Tariff No. 1 at § 4 *et seq*.

104 SBC's ISP affiliates offer dial-up Internet access services for $21.95 per month.

105 See www.swbell.com/dsl, Standard Plus Package $29.95 promotion. (viewed October 8, 2002).

106 *See Id.* For example, the $29.95 service price reverts to $42.95 after six months, resulting in an annualized rate of $36.45/month for SBC's 384 kpbs ADSL-based service.

107 *Sprint Communications Co., L.P. v. FCC*, 274 F.3d 549, 554 (D.C. Cir. December 28, 2001). While the price squeeze evaluated in this decision involved UNE rates, a checklist item, the fundamental tenant of the court's decision is that the Commission must undertake a public interest analysis that may go beyond literal application of the checklist. Moreover, the price squeeze in the DSL market results in part from SBC's failure to comply with the resale checklist item. Therefore, the price squeeze in the DSL market is relevant to this proceeding.

108 *Sprint Communications Co., L.P. v. FCC*, 274 F.3d at 555.

relevant under Section 271, explaining that a Section 271 application cannot be found to satisfy the public interest requirement where its prices doom competitors to failure.[109] SBC has established UNE and wholesale DSL access rates that do not permit viable competition. In the face of SBC's blatant price squeeze, the Commission cannot reasonably conclude that it is in the interest of California consumers to allow SBC into yet another market where it can engage in even greater cross-market manipulation.

IX. RECIPROCAL COMPENSATION

Pacific Bell's Application should also be denied because Pacific Bell fails to provide reciprocal compensation consistent with Commission regulations.

Pursuant to 47 CFR § 51.711, a CLEC is eligible to be paid reciprocal compensation for the transport and termination of telecommunications at the tandem switching rate if it serves a geographic area comparable to the area served by the ILEC tandem switch for the same geographic area. The Commission has made clear that, in order to qualify for the tandem rate, a CLEC's switch must only have the capability to serve a comparable geographic area. The CLEC switch is not required to have tandem switching functionality (*i.e.,* connecting switches to switches),[110] and it is not required to actually serve a dispersed customer base.[111]

Both RCN and Pac-West have deployed switches that have the capability to serve geographic areas comparable to the areas served by Pacific Bell tandem switches. Pacific Bell, however, has refused to compensate RCN and Pac-West at tandem switching rates. Pacific

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109 *Sprint Communications Co., L.P. v. FCC*, 274 F.3d at 554.

110 *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) at ¶ 105.

111 *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, WCB Dkt. No. 00-218 et al., DA 02-1731 (rel. July 17, 2002) at ¶ 309.

Bell's refusal constitutes a violation of Section 251(b)(5), and requires dismissal of its Application for Section 271 authority for failure to satisfy checklist item 13.

X. PACIFIC BELL'S APPLICATION IS NOT IN THE PUBLIC INTEREST

1. The Standard

Section 271(d)(3)(C) of the Act directs that the Commission shall not give Section 271 authorization unless the requested authorization is consistent with the "public interest, convenience and necessity."[112] This public interest standard was intended to mirror the broad public interest authority the Commission had been given in other areas.[113] The legislative history of the 1996 Act evidences an unequivocal intent on the part of Congress that the Commission "in evaluating Section 271 applications . . . perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."[114] As a Senate Report noted, the public interest standard is "the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in the bill."[115] The Report went on to add that "in order to prevent abuse of [the public interest standard], the Committee has required the application of greater scrutiny to the FCC's decision to invoke that standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services."[116]

The Commission recognized the huge import that Congress placed on the public interest standard by crafting a strong definition of the standard in the Section 271 context. The

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112 47 U.S.C. § 271(d)(3)(C).

113 *See* 47 U.S.C. § 241(a); § 303; § 309(a); § 310(d).

114 *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 385 (1997) ("*Ameritech Michigan 271 Order*").

115 *Id.* at n. 992, *quoting,* S. Rep. Mo. 23, 104th Cong., 1st Sess. 44 (1995).

116 *Id.*

Commission noted that under the standard it was given "broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest."[117] The Commission determined that as part of this broad authority it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act.[118] The Commission explicitly recognized that "Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority."[119]

Predictably, the RBOCs initially attempted to dilute the public interest standard. For instance, BellSouth argued that the public interest requirement is met whenever a BOC has implemented the competitive checklist.[120] BellSouth also contended that the Commission's responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market.[121] The Commission rejected both of these claims and reaffirmed that it will consider "whether approval of a Section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market."[122] The Commission stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[123] As

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117 *Ameritech Michigan 271 Order* at ¶ 383.

118 *Id.* at ¶ 385.

119 *Id.*

120 *In the Matter of the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana,* CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, ¶ 361 (1998).

121 *Id.*

122 *Id.* Congress rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion. *Ameritech Michigan 271 Order* at ¶ 389.

123 *Ameritech Michigan 271 Order* at ¶ 386.

the Department of Justice notes, in-region, interLATA entry by a Bell Operating Company ("BOC") should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.[124]

The importance of the public interest standard was reaffirmed in 2001 by Senators Burns, Hollings, Inouye, and Stevens in a letter to Chairman Powell.[125] In that letter the Senators stated:

> [t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.[126]

2. The Importance of the Public Interest Standard In Establishing Genuine Competition

A viable public interest standard will enable the Commission to look beyond technical checklist considerations and determine if competition has actually taken root in a particular state. The experiences of the California PUC demonstrates that one can find an application to be technically compliant with the checklist while still having reservations about the development of competition in the state.[127] Without an independent public interest standard, a RBOC that has a history of limiting competition in a particular state can at the last minute implement the minimum requirements necessary to satisfy this Commission, and allege checklist compliance without the development of actual, viable local competition in the state. An independent public

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[124] *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also, Ameritech Michigan 271 Order* at ¶ 382.

[125] Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001) ("*Senators' Letter*").

[126] *Id.* at 3.

[127] In fact, as noted below, the CA PUC did not find the application to be fully compliant with the checklist as it found non-compliance with Checklist Items 11 and 14.

interest standard would defeat such an approach and encourage future applicants to promote the development of true competition in the state.

While a BOC's entry into the long distance market may have pro-competitive effects, those benefits are only sustainable if the local telecommunications market remains open after BOC entry.[128] Thus, all the focus on the purported benefits of Pacific Bell entering the long distance markets in California is putting the cart before the horse. The local market has to be truly open to competition for those benefits to take root.

3. Considering All the Factors, Pacific Bell's Application Clearly Is Not In The Public Interest

Pacific Bell states that the "critical question is whether the July 23 Proposed Decision's [draft version of CA PUC decision] discussion of the public interest calls into doubt the conclusion that the local exchange market is open."[129] The Commenters agree that this is the critical question and the answer is unequivocally that the CA PUC's public interest analysis does call into question whether the market is open. The CA PUC explicitly stated that "Pacific's less than complete progress has given California, technical, not actual, local telephone competition."[130] Pacific has used a combination of its monopoly control over the local exchange market, its access to customer information, and anti-competitive practices to obtain a stranglehold on the local market. Now it seeks to extend such control to the long distance market. Such an action would imperil competition in the long distance market, and further dampen the limited competition in the local market.

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128 *Id.* at ¶ 390.

129 Pacific Bell Application at 100.

130 CA PUC 271 Order.

Pacific also contends that the CA PUC's public interest analysis fails to rebut the presumption that if the competitive checklist is satisfied, BOC entry into the long distance market will benefit consumers and competition.[131] First, as noted above, the public interest standard goes beyond the requirements of the competitive checklist and is an independent standard. Second, the CA PUC found that Pacific Bell did not meet two checklist items. Thus, even if there is such a presumption, Pacific fails to establish the predicate for the presumption.

Commenters stress that virtually all of the factors underpinning the CA PUC's decision may, and should be, taken into account by the Commission under the Section 271 public interest standard. In Section V, *supra*, Commenters explain how each of the factors of state interLATA entry standard are relevant to the federal standard. More broadly, the fact that the CA PUC, under its own determinations, has found that grant of this Application will not serve the public interest is, itself, a factor that this Commission must consider under the federal public interest standard. Even if, as a legal matter, the Commission could decline to defer to the CA PUC's analysis of DSL resale and other issues, it should not do so. Instead, the Commission should deny the Application for the very good reason that the CA PUC believes that, at this time, Pacific Bell's entry into the interLATA market in California would not serve the public interest in that state. Accordingly, the Commission should deny the Application for failure to meet the public interest standard of Section 271(d)(3)(C) of the Act.

XI. THE COMMISSION SHOULD ENSURE THAT DEDICATED TRANSPORT FACILITIES ARE AVAILABLE AT TELRIC PRICES

Under Section 251(c)(2) of the Act, Pacific Bell is required to provide any requesting telecommunications carrier with interconnection that is equal in quality to that provided to itself on rates, terms, and conditions that comply with Section 252. The Commission has interpreted

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[131] Pacific Bell Application at 99.

the term "interconnection" to mean "the physical linking of two networks for the mutual exchange of traffic."[132] It has also adopted "a cost-based methodology for states to follow in setting interconnection . . . rates."[133] In approving SWBT's Section 271 application for the State of Texas, the FCC took note that, while CLECs may choose any method of technically feasible interconnection, ILEC "provision of interconnection trunking is one common means of interconnection."[134]

CLECs often used dedicated transport facilities to facilitate this interconnection. RCN, for instance, utilizes ILEC transport facilities to interconnect its network (*e.g.*, switches, etc.) with the ILEC's network (tandem switches, end office switches, etc.) under the expectation of paying for such interconnection transport at cost-based UNE dedicated transport rates. A CLEC is harmed in its ability to turn up a market to begin serving customers, or augment its network or alleviate a blocking situation in an existing market, unless the ILEC provides quality interconnection facilities at cost-based prices.

Although the Act and FCC rules entitle CLECs to purchase cost-based facilities for interconnection purposes, some ILECs refuse to sell CLECs cost-based transport, *i.e.*, UNE dedicated transport," for interconnection trunks. For example, Verizon in several states, refuses to provide RCN cost-based interconnection facilities and forces RCN to order such facilities from Verizon's interstate special access tariff. Notwithstanding the fact that this position is completely inconsistent with FCC precedent, Verizon requires RCN to purchase interconnection

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132 *Local Competition Order* at ¶176.

133 *Id.* at ¶ 625; see also 47 C.F.R. §§ 51.501, 51.503(b).

134 *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, 164 (rel. June 30, 2000).

facilities at higher special access rates rates that do not comply with the cost-based pricing requirements of Section 252(d)(1) and FCC rules.

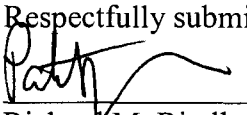
As part of the instant proceeding, the Commission should require Pacific Bell to fully demonstrate that it provides interconnection, including, but not limited to, dedicated transport, multiplexing, SS7, CNAM, and LIDB, at TELRIC prices as set by the CA PUC. Any backsliding by Pacific Bell must be subject to appropriate state and federal penalties.

RCN also takes this opportunity to call to the Commission's attention the fact that Pacific Bell's CNAM rate is considerably higher than CNAM rates of other BOCs. Pacific Bell's CNAM rate is approximately $0.0025/query compared, for example, to Verizon New York's CNAM rate of $0.000094/query. The Commission should evaluate this rate under the Commission's "benchmarking" approach to evaluating BOC prices in Section 271 proceedings. Manifestly, under that standard, Pacific Bell's CNAM rate is exorbitant and should be reduced prior to further consideration of this Application.

XII. CONCLUSION

For the foregoing reasons, the Commission should deny Pacific Bell's Application.

Respectfully submitted,



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